HSB Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–02–156 OF 2002 AND W–02–157 OF 2002

ARIFIN ZAKARIA, NIK HASHIM JJCA AND RAUS J

7 JUNE 2004

Civil Procedure — Pleadings — Amendment of — Application to amend statement of defence after judgment against second defendant — Principles governing amendment of pleadings — Application dismissed — Whether amendment should be allowed — Rules of High Court 1980 O 18 r 9, O 20 r 8(1)

There were two appeals before the court and both of them raised identical issues and the parties had agreed that the decision in respect of Civil Appeal No W–02–156 of 2002 bound the parties in respect of Civil Appeal No W–02–157 of 2002.

The respondent/plaintiff commenced a civil action in the High Court against the appellant/first defendant and one Hamidah as the second defendant. As against the first defendant, the plaintiff alleged that the signatures on 117 cheques with a total face value of RM483,591.21 (Civil Appeal No W–02–156 of 2002) and on 154 cheques with a total face value of RM1,244,255.72 (Civil Appeal No W–02–157 of 2002) were forged by the second defendant. Therefore, the aforesaid sums were wrongfully paid out from the plaintiffs account by the first defendant. As against the second defendant, the plaintiff alleged that she had converted the cheques and sought recovery under the doctrine of 'money had and received'.

On 16 January 2001 upon the application by the plaintiff's counsel, the learned judge entered judgment against the second defendant who failed to turn up for pre-trial case management pursuant to O 34 r 3(1) of the Rules of the High Court ('the RHC'). After the default judgment against the second defendant was entered and perfected, the first defendant filed the application before the learned judge in chambers for amendment of its defence on 5 November 2001. The application was dismissed. Hence this appeal. The issue before this court was: whether the appellant is entitled to amendment its defence after judgment pursuant to O 34 r 3(1) of the RHC against the second defendant.

Held, allowing the appeal:

(1) Pursuant to O 18 r 9 of the RHC, a party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ. And the court is empowered to allow amendments of any document for the purpose of determining the real question in controversy between the parties in accordance with O 20 r 8(1) of the RHC (see para 10).

(2) The materiality and effectiveness of the proposed amendment are relevant consideration. The court will not allow an amendment where the probable consequences of such an amendment would be useless or ineffectual (see para 12).

(3) Delay alone is not a ground to refuse an application for leave to amend. In the present case, the trial dates was on 5 November 2001 to 8 November 2001 and court had adjourned the trial of the action to 15 April 2002 due to plaintiff's delay in serving its bundle of documents on 1 November 2001. The application to amend was filed on 5 November 2001, five months before the commencement of trial. Therefore, it could not be argued that there was inordinate delay in the context of trial (see paras 15, 17, 19); *Wright Norma v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513 followed.

(4) The application for amendment revolved on the determination of pure question of law and there could be no prejudice whatsoever to the plaintiff. Even if there is any prejudice, it could be compensated by costs. And the court should in the exercise of its discretion in an application for amendment take into consideration not only the interest of justice but also the purpose of determining the real question in controversy between the parties (see para 21).

[**Bahasa Malaysia summary**

Terdapat dua rayuan di hadapan mahkamah ini dan kedua-dua rayuan tersebut melibatkan isu-isu yang sama dan pihak-pihak telah bersetuju bahawa keputusan Rayuan Sivil No W–02–156 tahun 2002 mengikat pihak-pihak di dalam Rayuan Sivil No W–02–157 tahun 2002.

Responden/plaintif telah memulakan satu tindakan sivil di Mahkamah Tinggi terhadap perayu/defendan pertama dan Hamidah sebagai defendan kedua. Terhadap defendan pertama, plaintif telah mendakwa bahawa tandatangan di dalam kesemua cek-cek berjumlah 117 yang kesemuanya bernilai RM483,591.21 (Rayuan Sivil No W–02–156 tahun 2002) dan cek-cek berjumlah 154 yang kesemuanya bernilai RM1,244,255.72 (Rayuan Sivil No W–02–157 tahun 2002) telah dipalsukan oleh defendan kedua. Oleh yang demikian, jumlah tersebut telah dikeluarkan secara salah daripada akaun plaintif oleh defendan pertama. Terhadap defendan kedua, plaintif mendakwa bahawa defendan kedua telah menukar cek-cek tersebut dan seterusnya menuntut terhadap defendan kedua di bawah doktrin 'money had and received'.

Pada 16 Januari 2001 menerusi permohonan peguamcara plaintif, hakim bijaksana telah memasukkan penghakiman terhadap defendan kedua mengikut A 34 k 3(1) Kaedah-Kaedah Mahkamah Tinggi ('KMT tersebut') yang telah gagal menghadirkan diri untuk pengurusan kes sebelum perbicaraan. Selepas penghakiman ingkar tersebut terhadap defendan kedua telah dimasukkan dan disempurnakan, defendan pertama telah memfailkan permohonan pada 5 November 2001 di hadapan hakim dalam kamar untuk meminda pembelaannya. Permohonan tersebut telah

ditolak. Maka, rayuan ini. Isu di hadapan mahkamah ini adalah: sama ada perayu berhak untuk meminda pembelaannya selepas penghakiman dimasukkan terhadap defendan kedua mengikut A 34 k 3(1) KMT tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Mengikut A 18 k 9 KMT tersebut, sesuatu pihak boleh dalam apa-apa pliding memplidkan apa-apa perkara yang telah berbangkit pada bila-bila masa, sama ada sebelum atau sejak pengeluaran writ. Dan mahkamah adalah diberi kuasa untuk membenarkan pindaan kepada mana-mana dokumen bagi maksud menentukan soalan sebenar yang menjadi kontroversi di antara pihak-pihak mengikut A 20 k 8(1) KMT tersebut (lihat perenggan 10).

(2) Kepentingan dan keberkesanan cadangan pindaan adalah perkara yang relevan. Mahkamah tidak akan membenarkan pindaan di mana kesan-kesan barangkali pindaan sedemikian adalah tidak berguna atau tidak berhasil (lihat perenggan 12).

(3) Kelewatan semata-mata bukan merupakan satu alasan untuk tidak membenarkan permohonan kebenaran untuk meminda. Dalam kes ini, tarikh perbicaraan adalah pada 5 November 2001 sehingga 8 November 2001 dan mahkamah telah menangguhkan perbicaraan ke 15 April 2002 memandangkan plaintif telah lewat dalam menyerahkan ikatan dokumen iaitu pada 1 November 2001. Permohonan untuk meminda telah difailkan pada 5 November 2001, lima bulan sebelum permulaan perbicaraan. Oleh yang demikian, adalah tidak boleh dihujahkan bahawa terdapat kelewatan yang melampau dalam erti kata perbicaraan (lihat perenggan 15, 17, 19); *Wright Norma v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513 diikut.

(4) Permohonan untuk pindaan tersebut adalah berkisar kepada penentuan satu soalan undang-undang dan dengan itu tidak terdapat sebarang prejudis terhadap plaintif. Sekiranya terdapat prejudis, ia dapat diberi pampasan menerusi kos. Dan mahkamah dalam melaksanakan budi bicaranya dalam permohonan untuk meminda harus bukan sahaja mengambil kira kepentingan keadilan tetapi juga tujuan dalam menentukan soalan sebenar yang menjadi kontroversi di antara pihak-pihak (lihat perenggan 21).]

Notes

For cases on amendment of pleadings, see 2(3) *Mallal's Digest* (4 th Ed, 2001 Reissue) paras 4396–4423.

For amendment of pleadings, see 10 *Halsbury's Laws of Malaysia* paras [10.3-192]–[10.3-198].

Cases referred to

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997] 1 MLJ 629 (refd)
Carmen Proetta v Times Newspapers Ltd (CA, 27 February 1991) (refd)
Cropper v Smith (1883) 26 ChD 700 (refd)
Ponnusamy & Anor v Nathu Ram [1959] MLJ 228 (refd)
State of Queensland & Anor v JL Holdings Pty Ltd (141) ALR 353 (refd)
Vincent Tang Fook Lam v Sok Chun Tang (P) [2004] 2 MLJ 145 (refd)
Wong Ah Hee @ Wong Ah Moi & Anor v Low Tuck Hoong [1993] 2 AMR 48 (refd)
Wright Norma v Oversea-Chinese Banking Corp Ltd [1994] 1 SLR 513 (folld)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Bills of Exchange Act 1949 s 24
Rules of the High Court O 18 r 9, O 20 rr 5, 8(1), O 34 r 3(1)

Lambert Rasa-Ratnam (BH Yap with him) (M/s Lee Hishammuddin) for the appellant.
TJ Su (KL Pang with him) (Cheah Teh & Su) for the respondent.

Nik Hashim JCA (delivering judgment of the court):

BACKGROUND

[1] There are two appeals before the court and both of them raise identical issues. In the circumstances, the parties have agreed that the decision in respect of Civil Appeal No W–02–156 of 2002 binds the parties in respect of Civil Appeal No W–02–157 of 2002. The court acceded to the agreement.

[2] The appellant (the first defendant) filed an application before the learned judge in chambers for amendment by inserting a new paragraph 13 in its statement of defence pursuant to O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). The application was dismissed. Hence this appeal.

[3] The facts that led to the application by the first defendant are that the respondent plaintiff commenced a civil action in the High Court against the first defendant and one Hamidah as the second defendant. As against the first defendant, the plaintiff alleged that the signatures on 117 cheques with a total face value of RM483,591.21 (Civil Appeal No W–02–156 of 2002) and on 154 cheques with a total face value of RM1,244,255.72 (Civil Appeal No W–02–157 of 2002) were forged by the second defendant. Therefore, the aforesaid sums were wrongfully paid out from the plaintiff's account by the first defendant. As against the second defendant, the plaintiff alleged that she had converted the cheques and sought recovery under the doctrine of 'money had and received'. Thus, the plaintiff's cause of action

against the first defendant is based on s 24 of the Bills of Exchange Act 1949 whereas the cause of action against the second defendant was for the tort of conversion.

[4] On 16 January 2001 upon the application by the plaintiff's counsel, the learned judge entered judgment against the second defendant who failed to turn up for pre-trial case management pursuant to O 34 r 3(1) of the RHC after she had filed her defence. After the default judgment against the second defendant was entered and perfected, the first defendant filed the application for amendment of its defence on 5 November 2001. The proposed amendment reads:

> 13 The plaintiff had entered judgment against the second defendant on 16 January 2001. As a consequence thereof, the plaintiff is prevented and or estopped from further proceedings with its claim against the first defendant and or the entry of judgment against the second defendant by the plaintiff in law amounts to an election which bars further proceedings of the plaintiff's claim against the first defendant.

[5] It is to be noted that on 29 March 2001, the learned judge fixed trial dates on 5 November 2001 to 8 November 2001. On 1 November 2001, the plaintiff served its last bundle of documents. The learned judged adjourned the trial date to 15 April 2002.

GROUNDS FOR AMENDMENT

[6] The grounds for the application for the proposed amendment were as follows:

(1) The plaintiff had entered judgment in default against the second defendant on 16 January 2001;

(2) the first defendant's solicitor only knew on 25 October 2001 that the judgment against the second defendant was sealed;

(3) it is a good defence of the first defendant based on the fact that the plaintiff had entered judgment against the second defendant and therefore the plaintiff is prevented and or estopped from proceeding his claim against the first defendant and or the plaintiff by entering judgment against the second defendant in law amounts to an election which prevents further proceedings of its claim against the first defendant;

(4) the proposed amendment could not be included in the defence due to the fact that the judgment entered against the second defendant took place after the defence was filed;

(5) the proposed amendment is to identify the real issue between the plaintiff and the first defendant and so that the proposed amendment can be pleaded and argued;

(6) the amendment will not prejudice the plaintiff.

JUDGE'S DECISION

[7] The learned judge dismissed the application. From the grounds of judgment, the learned judge appears to have dismissed the application for three reasons:

(1) on the merits of the issue sought to be raised by the proposed amendment;

(2) if the proposed amendment was allowed and the issue of law raised by it was subsequently found in favour of the first defendant, the merits of the plaintiff's case would not be decided after the benefit of a full trial; and

(3) delay.

CONTENTIONS OF PARTIES

[8] It is the submission of learned counsel for the first defendant that the learned judge was wrong to have dismissed the application for the reasons he gave. Learned counsel for the plaintiff, on the other hand, argued that the proposed amendment was unmeritorious and not bona fide, and that the application being late, was a tactical manoeuvre which amendment, if allowed, would result in prejudice to the plaintiff which could not be compensated with costs.

DECISION

[9] The law governing amendment of pleadings are well-established. Mohd Noor Ahmad JCA (as he then was) in the recent case of *Vincent Tang Fook Lam v Sok Chun Tang (P)* [2004] 2 MLJ 145 at p 155 reiterated the law:

> The law on amendment of pleadings is well-settled. The provision relating to amendment of the writ and pleadings is governed by O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite that if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, the apex court of this country, had the occasion to consider and interpret O 20 r 5 of the RHC. It is the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 where the Federal Court set out three basic questions for consideration, viz:
>
> (1) whether the application was bona fide;
>
> (2) whether the prejudice caused to the other side can be compensated by costs; and
>
> (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.
>
> (see *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49 at p 53). It was for the plaintiff who asked the court to exercise a discretionary power in her favour to place some material and advance some cogent reasons to impel the court to lean

on her side (see *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793; [1993] 2 SLR 113). As for the general principles for the granting of leave to amend, this was elaborated by adoption in *Hock Hua Bank Bhd v Leong Yew* Chin [1987] 1 MLJ 230 SC at p 232 by Abdul Hamid Ag LP, where he stated and cited:

> 'As for the general principles for the granting of leave to amend:
>
> "It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216, p 1231; [1958] 3 All ER 540, p 546).
>
> It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Court do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a mater of right (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700, pp 710-722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* (1896) 1 Ch 108, p 112).
>
> In *Tildesley v Harper* (1876) 10 Ch D 393, pp 396, 397 Bramwell LJ said:
>
> 'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.' *(The Supreme Court Practice 1985* para 20/5-8/6 p 340)."

[10] A party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ (O 18 r 9 of the RHC). And the court is empowered to allow amendments of any document for the purpose of determining the real question in controversy between the parties (O 20 r 8(1) of the RHC). In *Wright Norma v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513, the Court of Appeal of Singapore at p 515 held:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise... This is so even though the omission was caused by careless or the application for amendment was made very late in the day: per Brett MR in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at p 263.

[11] The authorities have shown that the courts do readily grant leave to amend before trial. In *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629 at p 640, Abdul Malek Ahmad JCA (as he then was) in delivering the judgment of the Court of Appeal said:

> The authorities strongly indicate that the courts should lean in granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

[12] However, the materiality and effectiveness of the proposed amendment are relevant consideration. The court will not allow an amendment where the probable consequences of such an amendment would be useless or ineffectual. Good J in *Ponnusamy & Anor v Nathu Ram* [1959] MLJ 228 said that in an application to amend the pleadings, the court should consider the materiality and the effectiveness of the amendment, and that it was a well established practice not to allow an amendment where it appeared that such an amendment would be useless. It was further held that the court should look at the probable consequences of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made (see also *Wong Ah Hee @ Wong Ah Moi & Anor v Low Tuck Hoong* [1993] 2 AMR 48). The High Court of Australia in the *State of Queensland & Anor v JL Holdings Pty Ltd* (141) ALR 353 referred to *Cropper v Smith* which held that:

> As the defence, if established, would be a complete answer in either action, the amendments sought should have been allowed unless it appeared that injustice would thereby have been occasioned to the respondent, there being nothing to suggest fraud or improper concealment of the defence on the part of the appellants.

[13] Therefore, the proposed amendment has the effect, if determined in favour of the first defendant, of providing a complete answer to the plaintiff's claim.

[14] Thus, applying the law to the facts of the instant case, we find much merit in the application. The proposed amendment is intended to raise the issue of election: whether the plaintiff is prevented from further proceeding of its claim against the first defendant after it has entered judgment against the second defendant. The question of election as sought to include in the proposed amendment cannot arise before the plaintiff actually opted to enter judgment against the second defendant. The judgment against the second defendant was entered after the first defendant had filed its defence. It is therefore impossible for the first defendant to file the application earlier than 16 January 2001. By entering and perfecting the judgment against the second defendant, the plaintiff had represented to the first defendant that it now wished to only pursue against the second defendant. Clearly, this is a question in controversy.

[15] On the question of delay, it is worthy of note that delay alone is not a ground to refuse an application for leave to amend. In *Wright Norma* at p 519, the court held:

> While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice. We do not think any rigid rule should or can be laid down on this.

[16] It was further held at p 523 that:

> ... the learned judge ... had erred in exercising his discretion when ... he treated delay as being decisive to the question. It is but one factor to be placed on the scale.

[17] In the present case, the court had adjourned the trial of the action to commence on 15 April 2002. The application to amend was filed on 5 November 2001, five months before the commencement of trial. Therefore, it cannot be argued that there was inordinate delay in the context of trial. An unreported decision of English Court of Appeal in *Carmen Proetta v Times Newspapers Ltd* (followed in *Wright Norma*) even allowed an application to amend defence which was made 10 days before trial.

[18] With regard to the question of prejudice, there is no immediate prejudice occasioned by the proposed amendment at this stage. The plaintiff was presupposing that its claim would be answered by the proposed amendment at much later stage. In our view, this is irrelevant for the purpose of contesting the application. The plaintiff would suffer no prejudice that cannot be compensated by costs, if the application for amendment is allowed.

[19] Respecting the alleged tactical manoeuvre, we find there is no basis whatsoever for the allegation. Neither there is evidence that the application was not bona fide. The proposed amendment sought herein is purely a question of law and the relevant facts for its purpose are mostly undisputed. The trial was not in anyway delayed by the application. In fact, the plaintiff was to be blamed for serving its last bundle of documents on the evening of 1 November 2001. This was the basis for the trial to be adjourned by the court to 15 April 2002.

[20] Besides, the merit of the proposed amendment is not relevant at the application stage. Learned counsel for the plaintiff argued that the doctrine of election has no application in this case, and as such, the proposed amendment would be useless and ineffectual. That may or may not be so, but at the end of the day, it is for the trial court eventually to decide whether the first defendant's claim is unmeritorious after hearing all the evidence and arguments: *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213. Thus, the learned judge erred in exercising his discretion when he ruled on the merits of the proposed amendment at that stage.

A CONCLUSION

[21] It is therefore our view that the learned judge had not exercised his discretion judiciously when he dismissed the application. The court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of election for the first time on the ground that the
B amendment would not only be in the interest of justice but also for the purpose of determining the real question in controversy between the parties. The case revolved on the determination of pure question of law and there could be no prejudice whatsoever to the plaintiff. Indeed, it would be a denial of justice if leave to amend were refused.

C **[22]** Accordingly, we allowed the appeal with costs and set aside the order of the learned judge. The deposit paid into court was ordered to be refunded to the first defendant. The application to amend was granted in terms of the summons in chambers dated 5 November 2001 with costs to be borne by the first defendant.

D *Appeal allowed.*

Reported by Sugandra Rao

E

F

G

H

I